UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

v. **Criminal Action No. 3:06MJ-230**

STEVEN D. GREEN

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO PRESERVE EVIDENCE

For the reasons stated below, the United States, by counsel, objects to the defense Motion to Preserve Evidence, and requests that the motion be denied. Defendant Green's motion asks this Court to enter an order that in some respects merely requires the government to comply with its legal obligations and in other respects goes far beyond the rules governing criminal trials in federal courts.

This Court need not order the United States to comply with its discovery obligations. The United States recognizes and honors its obligation to preserve and disclose to the defense any discoverable evidence or material in its possession, custody or control, in compliance with all applicable procedural rules and federal common law. Thus, in this respect the motion is unnecessary.

The motion, however, also goes well beyond the government's legal obligations. The applicable rules and cases do not mandate the broad preservation and disclosure to the defense of all the items the motion seeks, and in this respect the motion should be denied as overly broad.

DISCUSSION

In the first part of the motion, the defense asks that this Court order the United States to "maintain and preserve" "evidence of any kind or nature" which is in or may come into "the possession, custody or control of the United States." He then lists four separate categories of evidence

which he contends are subject to preservation, apparently for later disclosure, under cited rules, statutes, and cases.

The first category of evidence defendant Green's motion seeks is evidence "subject to disclosure, discovery, inspection or subpoena" pursuant to Federal Rules of Criminal Procedure 6(e), 7 (f), 16(a)(1) and 17. (Def. Motion at 1-2). The discovery provisions of Fed. R. Crim. P. 16 set out what must be disclosed to defendants in federal criminal cases, and, as it does in every case, the United States will comply with those rules in accordance with our obligations.[1] It is unnecessary, and premature, absent any reason to believe there will be any non-compliance, for the Court to enter an order concerning material subject to Fed. R. Crim. P. 16.

The other rules defendant cites in this first category do not deal with preservation or disclosure of evidence per se. Rule 6(e) deals with recording of grand jury proceedings, and with maintaining the secrecy of those proceedings. Rule 7(f) allows the Court to direct the United States to file a bill of particulars if an indictment is not sufficient under the requirements of Rule 7. Finally, Rule 17 sets out the general requirements for issuance of and compliance with subpoenas. If and to the extent circumstances arise under which the United States must provide evidence or information to defendant Green under any of these rules, the United States will, of course, comply with those requirements. As with the Rule 16 compliance, it is unnecessary for this Court to enter any order as to any information which might be covered by these rules.

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[1]Fed. R. Evid. 16 contemplates that discovery will occur after a criminal defendant is indicted. In Re Possible Violation of 18 U.S.C. Secs. 201, 371, 491 F. Supp. 211, 214-15 (D.D.C 1980)(discovery is available only after indictment; due process does not require otherwise); In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 867 (D.Minn. 1979) (Fed. R. Crim. P. 16 precludes discovery under the Rules prior to indictment).

The second category in the defense motion concerns evidence "arguably subject to production or disclosure at trial pursuant to 18 U.S.C § 3500, Federal Rule of Criminal Procedure 26.2, and Federal Rule of Evidence 612 or 613(a)." (Def. Motion at 2). The third category involves evidence "arguably favorable or useful to the defendant under the principles of Brady v. Maryland, 373 U.S. 83 (1963)." (Def. Motion at 2). With respect to these two categories of information, like the first category, the United States understands and abides by its disclosure obligations in all cases, and will meet those obligations in this case. It is unnecessary for the Court to enter an order directing the United States to follow the law.

The fourth category in Green's motion seeks preservation of "evidence of any kind that can be tested scientifically," including samples of tissue or body fluids resulting from an autopsy or similar government procedure. (Def. Motion at 2). To the extent that Green asks that the United States preserve items having actual evidentiary value, and to the extent that those items would not be destroyed or consumed by any scientific tests which might be conducted by the Government, the United States intends to preserve all such evidence. Once again, the United States will honor its obligations under the applicable federal rules and common law without the need for a court order. But to the extent that the language in Green's motion seeks preservation of every tangible item which might be scientifically tested and which might conceivably come into the United States' possession, for possible disclosure to the defense, then the United States objects. The United States acknowledges its duty to preserve "material evidence" "that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488 (1984). The United States will certainly not intentionally destroy or discard any item having evidentiary value within its possession,

custody, or control, or which would constitute exculpatory evidence to which the defendant is entitled.[2] But the defense's request for preservation of "evidence of any kind that can be tested scientifically" (emphasis added) is over broad, and suggests that the United States' obligation is greater than what is actually required by applicable federal law.

Finally, at the end of the motion, the defense demands that the United States provide "a list of all documents, records, information, or other evidence of any kind or nature relevant or otherwise pertaining to this case which has been destroyed or otherwise altered in any form or manner for whatever reason prior to the filing of this Motion." Items to be included are " but not limited to, rough notes of interviews, reports, memoranda, subpoenaed documents and other documents." (Def. Motion at 2-3). The defense motion states that the authority for requesting such a list is United States v. Agurs, 427 U.S. 97 (1976); Giles v. Maryland, 386 U. S. 66 (1967); and Brady v. Maryland, 373 U.S. 83 (1963). However, those cases do not oblige the United States to generate the sort of list the defense requests, or to attempt to canvass every investigator as to what procedures they follow in creating their reports. In sum, Green has not shown that he has any right to require the government to produce a list of evidence, even before an indictment is returned.[3]

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[2]To be constitutionally material, evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489. The United States is mindful of these criteria.

[3] The prosecutor's obligation to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963), does not attach at the pre-indictment stage. United States v. Ruyle, 524 F.2d 1133, 1135-36 (6th Cir.1975)(defense not entitled to have information favorable to the defense presented to the grand jury before indictment); In re Grand Jury 89-2, 728 F. Supp. 1269, 1274 n.12 (E.D. Va. 1990) (same) (citing United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir. 1976)); United States v. Smith, 824 F. Supp. 420, 424 (S.D.N.Y. 1993).

Besides the absence of legal support for this request, the defense has provided no factual basis for believing that any agent of the United States government, whether military or civilian, has destroyed or altered any records, documents, or evidence of any kind. The undersigned are unaware that any such items have been destroyed or altered. Neither the Army nor the civilian investigators have any interest in intentionally destroying any evidence. The investigators' interest is in preserving the results of their investigation, not destroying or discarding it.

This Court is entitled to presume that the agents have and will properly discharge their official duties. United States v. Armstrong, 517 U.S. 456, 464 (1996). Unless and until the defense provides some clear evidence suggesting the destruction of evidence, it is premature to require the United States to generate a list of the sort the defense describes, much less require the United States to canvass every single investigator who has been involved in this matter.

Defendant Green suggests that he would be denied a fair trial if he does not have an opportunity to inspect all the items he cites in his motion. But even if evidence is inadvertently destroyed, that would not constitute a due process violation. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (no due process violation where state failed to preserve semen samples). See also Trombetta, 467 U.S. at 491 (no due process violation where state failed to preserve drunk driver breath samples); United States v. Wright, 260 F.3d 568 (6th Cir. 2001) (no due process violation where United States failed to preserve building electrical system in arson prosecution). Unless the United States or its agents act in bad faith, due process requirements necessary for a fair trial are not violated. Illinois v. Fisher, 540 U.S. 1174, 1202 (2004). After all, the Supreme Court has "never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of the police." Id.

CONCLUSION

To the extent that Defendant Green seeks an order requiring the United States to do what it is already bound to do under the applicable rules, statutes, and case law, such an order is unnecessary. The United States understands its obligations under the applicable law. The defense offers no facts or circumstances suggesting the United States will not comply with its preservation and discovery obligation. And to the extent that the motion seeks to preserve any potential evidence that might potentially be subject to scientific testing, it is overly broad, impracticable, and unsupported by law.

For these reasons, the United States respectfully requests that the Court deny the Motion to Preserve Evidence. A conforming order is tendered herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response was mailed and faxed this 25th day of July, 2006, to Scott T. Wendelsdorf, Federal Defender, and Patrick J. Bouldin, Assistant Federal Defender, 200 Theatre Building, 629 Fourth Avenue, Louisville, Kentucky 40202, counsel for Defendant, Steven D. Green.

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